UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18

ART, LLC and UNITED FOOD & COMMERCIAL WORKERS, LOCAL 653	Case 18-CA-168725
GLEN LAKE'S MARKET, LLC and UNITED FOOD & COMMERCIAL WORKERS, LOCAL 653	Case 18-CA-168726
THOMAS B. WARTMAN and UNITED FOOD & COMMERCIAL WORKERS, LOCAL 653	Case 18-CA-168727
THOMAS W. WARTMAN and UNITED FOOD & COMMERCIAL WORKERS, LOCAL 653	Case 18-CA-168728
VICTORIA'S MARKET, LLC and UNITED FOOD & COMMERCIAL WORKERS LOCAL 653	Case 18-CA-168729

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INTRODUCTION

Respondents respectfully submit the following brief opposing the exceptions filed by General Counsel and the Union. General Counsel and the Union rehash the arguments that were unsuccessful before the Administrative Law Judge, failing even at this point to grasp the implication of this matter's procedural posture. Respondents did not need to prove any aspects of their case at the hearing. Rather, General Counsel and the Union had to prove that Respondents' lawsuit was "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 526 (2002). This was an impossible task given the existence of case law and board decisions that directly support Respondents' position. General Counsel and the Union may not agree with those cases or decisions, but that is entirely inconsequential at this juncture, when Respondents could have brought this case even if it "entails some tacking into the wind of adverse precedent." *Children's Hosp. Med. Ctr. of N. Cal.*, 351 N.L.R.B. 569, 571 (2007).

Specifically, the Board should uphold the ALJ's ruling on Respondents' secondary picketing claim for the following reasons:

- Existing case law supports Respondents' interpretation of the Act and conflicts with the Union's insistence that the "*sine qua non*" of a secondary picketing claim is a disruption of business between the primary and secondary employer.

- The allied doctrine is a fundamentally fact-intensive enterprise that is ill-suited to support a claim that a lawsuit is inherently baseless, especially since there are no Board decisions on point with the facts present in this case.

- General Counsel's scattershot exceptions, unsupported by any argument, do nothing to change the outcome of the ALJ's decision as it relates to Respondents' secondary picketing claim.

For reasons more fully described below, Respondents respectfully request that the Board affirm the ALJ's ruling as it relates to Respondents' secondary picketing claim and allow Respondents to exercise their First Amendment Right to seek redress of grievances in Court.

ADDITIONAL FACTS

Respondents incorporate the facts as stated in their brief filed in support of their exceptions. Additional facts are necessary, however, to address the misrepresentations of General Counsel and the Union. Both General Counsel and the Union erroneously conflate Mr. Wartman with other parties, ignoring or plainly misstating the evidence in the record. At best, these misstatements result from an over-eagerness to pursue Mr. Wartman, a hallmark of this entire case. Clarification is thus necessary so that the Board may make a decision based on the evidence actually presented to the ALJ at the hearing.

Importantly, the gravamen of the following fact section is not to determine who would have ultimately prevailed at the trial; such is not the legal standard. *BE&K Constr. Co.*, 536 U.S. at 526; *Bill Johnson's Rests. v. NLRB*, 461 U.S. 731, 744 (1983). Rather, the purpose is to illustrate the facts at hand when the Lawsuit was commenced and thereby eviscerate the notion that Respondent's secondary picketing claim was baseless. In other words, Respondents did not (and do not) need to prove their case; rather, they need simply show that the law and facts could have objectively supported it.

I. NEW STORES, UNDER NEW OWNERSHIP AND MANAGEMENT, OPENED AND BEGIN OPERATION.

A. Tommy Initiates the Idea of Opening New Stores to Replace Fresh Seasons Markets and Fill Vacancies in the Properties.

After Fresh Seasons Markets closed, Victoria City Center was left with a major vacancy. Tr. 136, 201. Thomas W. Wartman ("Tommy") approached his father, Thomas B. Wartman

("Mr. Wartman"), during the fall of 2014 with the idea of placing new stores in the buildings after Fresh Seasons Markets closed. Tr. 136, 283. Specifically, Tommy recognized the buildings would have more value with a tenant in place. Tr. 136. Mr. Wartman was intrigued by the idea because it gave him an opportunity to leave his boys, in his words, a legacy. Tr. 478. He personally had no interest in running grocery stores since he was approaching retirement age. Tr. 479.

The Union erroneously states that Tommy had no experience in the grocery industry. Union's Brief in Support of Exceptions ("Union Brief") 20. This is entirely incorrect. Tommy testified that he had experience in grocery while working at Fresh Seasons Markets in 2006.[1] Tr. 284. Moreover, he was not involved in a low-level position, but rather worked as a center-store manager. Tr. 278.

General Counsel also erroneously states that Mr. Wartman maintained ownership of the real estate between Fresh Seasons Markets and the new stores. General Counsel's Brief in Support of Exceptions ("GC Brief") 2. As Mr. Wartman clearly explained during the hearing, the Fresh Seasons location in Glen Lake was sold to a third party on October 15, 2012. Tr. 401. Mr. Wartman did not have any interest in that real estate until April 1, 2015, nearly one year after Fresh Seasons Markets closed. Tr. 401.

B. <u>The New Stores Are Organized Under Entirely New Legal Entities Without Any Shared Ownership With Fresh Seasons Markets.</u>

One of Tommy's first steps was to form a company entitled ART, LLC. Tr. 289–90. ART, LLC was formally organized and its Articles of Organization were filed with the Secretary of the State. Tr. 290; Resp. Ex. 2. When ART, LLC was formed, Tommy, Ryan and Adam each

[1] Throughout this brief, Respondents will refer to Fresh Seasons Markets, LLC and Fresh Seasons Markets Victoria, LLC collectively as "Fresh Seasons Markets."

had a one-third ownership interest. Tr. 134–35. Nonetheless, Tommy was always in charge of this entity. Tr. 135.

Tommy followed sound corporate governance principles. ART, LLC had its own bank account at Minnwest Bank. Tr. 292; Resp. Ex. 10. The only people with access to this bank account were Tommy and Elizabeth Wyatt, who was given permission to access this account because she was assisting in business and financial aspects involved in the opening of the new stores. Tr. 292. In 2015, ART, LLC filed tax returns listing Adam, Ryan, and Tommy as one-third owners, just as reflected in the company's organizational documents. Tr. 300; Resp. Ex. 5. While ART borrowed money from Mr. Wartman, these loans came with the expectation that they needed to be paid back and, in fact, one was paid back.[2] Tr. 319. These loans were further documented with formal loan agreements. Resp. Exs. 6–9.

Tommy eventually approached Mark Ploen as a potential investor. Tr. 287. ART, LLC and Mark Ploen together created Glen Lake's Market, LLC ("Glen Lake's Market") and Victoria's Market, LLC ("Victoria's Market") as the companies that would own the assets of the new stores. Tr. 138, 140, 301. These companies were formally organized in filings with the Minnesota Secretary of State, and governed by Articles of Organization and Bylaws. Resp. Exs. 11–13, 25–27. ART, LLC and Mark Ploen each owned 50% of Glen Lake's Market and Victoria's Market. Tr. 138, 140, 307; Resp. Exs. 11–13, 25–27. Further, Glen Lake's Market and Victoria's Market filed tax returns demonstrating ownership interests consistent with those reflected in the organization documents, i.e. 50 % ownership by ART, LLC and 50% ownership by Mark Ploen. Tr. 303, 308, Resp. Exs. 15 and 31. Mark Ploen and Tommy also served as the

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[2] ART, LLC repaid the December 15, 2015 loan with interest on March 31, 2016. Tr. 41, 298.

directors of both Glen Lake's Market and Victoria's Market, with Tommy serving as Chief Executive Officer for both companies. Tr. 304, Resp. Ex. 14 at 27, 27 at 27.

Tommy established a bank account for Glen Lake's Market at Beacon Bank. Tr. 309. Initially, Tommy included Mr. Wartman as a signer on the account for Glen Lake's Market for the same reason Tommy had included Elizabeth Wyatt as a signer—there was going to be an initial period of chaos as the stores opened and Tommy needed multiple people to sign checks in the event he was unavailable. Tr. 309; Resp. Ex. 21. Several weeks later, Tommy removed Mr. Wartman from the list of authorized signers for Glen Lake's Market. Tr. 310; Resp. Ex. 22.

Tommy also established a wire transfer account for Glen Lake's Market. Tr. 311; Resp. Ex. 23. Tommy and Ms. Wyatt were authorized to utilize this account, whereas Mr. Wartman was not. Tr. 311; Resp. Ex. 23. Tommy further established a bank account at Minnwest Bank for Glen Lake's Market. Tr. 311; Resp. Ex. 24. Again, Tommy and Ms. Wyatt were authorized to access this account, whereas Mr. Wartman was not. Tr. 311; Resp. Ex. 24.

Tommy established a bank account for Victoria's Market at Beacon Bank. Tr. 312; Resp. Exs. 35–39. While Mr. Wartman was originally included as an authorized signer along with Tommy, he was shortly removed and replaced by store employees Alan Commins, Will Jedlicka, and Lyle McKinney. Tr. 312; Resp. Exs. 35–38.

In addition to overstating Mr. Wartman's involvement in the new stores, the Union attempts to characterize the funding and creation of the new stores as occurring "[a] mere matter of months" after Fresh Seasons Markets closed. Union Brief 22. As the record makes clear, however, these entities were formed nearly a year after Fresh Seasons Markets closed, with the first store opening one year later. Unfortunately, this inaccurate recitation of the facts is a hallmark of the briefs submitted by General Counsel and the Union, as they erroneously attempt to conflate Mr. Wartman with all aspects of the new stores, despite the evidence and testimony to the contrary.

C. The New Stores Purchase Equipment at a Foreclosure Sale Through Minnwest Bank as Part of an Arm's-Length Transaction.

General Counsel and the Union point to the sale of Fresh Seasons Markets assets as if it was a smoking gun that clearly implicates Mr. Wartman's culpability. As with so many of the "facts" relied upon by General Counsel and the Union, this sale does nothing to change the significant separation between the new stores and Fresh Seasons Markets. To the precise contrary, those facts support the claims asserted in the action.

Glen Lake's Market and Victoria's Market purchased their equipment from Minnwest Bank pursuant to a foreclosure sale. Tr. 313. Mark Ploen signed the bill of sale on behalf of both Glen Lake's Market and Victoria's Market. Tr. 313–14; Resp. Exs. 17, 33. This equipment was purchased for a total of $1,244,955 ($690,372 by Glen Lake's Market and $554,583 by Victoria's Market). Resp. Ex. 17, 33. Tommy was responsible for deciding to purchase this equipment. Tr. 314. He valued the equipment as roughly $3 million new and, thus, perceived the bank's offer as a good deal. Tr. 315. He also compared this purchase price to the forecasted sales for the new stores, finding that the price compared favorably to the potential profit. Tr. 315.

D. The New Stores Have a Unique Layout, New Managers, and a New Workforce.

The new stores were not the same operation as Fresh Seasons Markets. Tr. 285. Whereas Fresh Seasons Markets had attempted a more "up-scale" grocery experience, Tr. 279, the new stores focused more on bulk and natural foods. Tr. 285. The new stores also had a dietary advisor on hand to provide advice for healthy food options. Tr. 285–86. Finally, the stores had a small formal café towards the front. Tr. 286. The new stores also had a health area that was substantially different than anything else in the Twin Cities. Tr. 285.

Because he had a hands-off style of management, Tommy wanted consultants and managers in whom he could invest a great deal of discretion. Tr. 321–22. As Ms. Wyatt testified, Tommy was not a micro-manager. Tr. 465. Thus, in addition to hiring Michelle Aspelin to assist with marketing and social media, the new stores hired Chris Schulties, Elizabeth Wyatt, and Robert Foster. Tr. 322.

In particular, Elizabeth Wyatt was given a wide degree of discretion to manage and develop certain processes for the store. Tr. 460. For example, she was an authorized signer for Glen Lake's Market's bank account at Minnwest Bank. Resp. Exs. 24. She was also responsible for picking service providers for the employers. Tr. 326. In one particular instance, for example, she chose an insurer for the stores, CBIZ. Tr. 327–28, 462–63. Mr. Wartman was involved in the discussion regarding insurers and suggested that the new stores use EZ Health. Tr. 462. Ms. Wyatt prevailed, and the new stores utilized CBIZ as the insurance providers. Tr. 463, 468.

Tommy hired Will Jedlicka to serve as the General Manager for Victoria's Market and, with Chris Schulties' assistance, Tommy hired Alan Commins as the manager for Glen Lake's Market. Tr. 329. Though he was assigned to Glen Lake's Market, Alan Commins was also responsible for overseeing Will Jedlicka, as Commins had more experience in the industry. Tr. 331. Both Alan Commins and Will Jedlicka had authority to run the stores and were under no obligation to obtain Mr. Wartman's authority when making any decisions. Tr. 331–32. Will Jedlicka and Alan Commins had the authority to hire employees at the stores. Tr. 329. In contrast, Mr. Wartman did not have hiring authority at the stores, nor did he have authority to assign employees to various positions. Tr. 329–30. According to the testimony of Matthew

Utecht, Alan Commins and Will Jedlicka would have been "truly management" of the new stores because they were in the role of Store Managers. Tr. 204.

Each store hired approximately 55 to 60 employees. Tr. 202. However, as Mr. Utecht admitted, only three of those almost 120 employees had worked at Fresh Seasons Markets before they closed. Tr. 202. Moreover, the only two management employees who had worked at both stores, Rick Stucki and Lyle McKinney, had ended their employment at Fresh Seasons Markets 18 to 24 months before Fresh Seasons Markets closed. Tr. 476–77.

In addition to selecting the work force, Will Jedlicka and Alan Commins were responsible for selecting vendors for the new stores. Tr. 324. However, Tommy had final approval on vendor selection. Tr. 324. He further signed a number of vendor agreements. Tr. 324; Resp. Exs. 34, 42. Will Jedlicka and Alan Commins also signed some vendor agreements. Tr. 325. Mr. Wartman, however, did not sign a single vendor agreement. Tr. 325.

Tommy was responsible for signing the checks for the vendors. Tr. 144. This was confirmed by Elizabeth Wyatt, who testified that, after she had established a system for payment of vendors, Tommy signed all of the checks that were used to pay vendors. Tr. 460. Though she admitted she was not aware of all checks that had been issued before her involvement, Elizabeth Wyatt testified Mr. Wartman did not sign a single vendor check after she had established her system for tracking payments. Tr. 460. Again, General Counsel did not rebut this testimony.

E. Mr. Wartman Works at the New Stores as an Unpaid Independent Consultant and as the Landlord for the Buildings.

Tommy himself had limited experience in the grocery industry and thus welcomed his father's assistance to serve as a consultant during the build-out phases of the new stores. Tr. 143. Mr. Wartman had experience in construction he leveraged to the benefit of the new stores and thus assisted in the remodeling of Victoria's Market. Tr. 32, 320, 333. After Victoria's Market opened, Mr. Wartman switched his efforts to Glen Lake's Market to assist with the remodeling at that location. Tr. 33–35, 320, 333. After the stores opened, Mr. Wartman's involvement in the new stores dropped precipitously. Tr. 333–34. General Counsel and the Union thus wrongly imply that Mr. Wartman was significantly involved in both stores on a continuous basis until they closed. Rather, once his role was complete, Mr. Wartman spent much less time at both stores, a fact that went undisputed at the hearing.

F. General Counsel and the Union Fail to Introduce Any Credible Testimony that Mr. Wartman's Role was Anything More than a Landlord and an Unpaid Consultant.

General Counsel and the Union rely heavily on an email sent by Michelle Aspelin, as if it represented the crucial link between Mr. Wartman and the new stores, when her testimony demonstrated the complete opposite. Despite the reference in the email to Mr. Wartman, Ms. Aspelin testified that she understood that Mr. Wartman's interest in the buildings was limited to his role as a landlord. Tr. 128. Ms. Aspelin further testified that "it was very clear [Mr. Wartman] did not own the stores." Tr. 129. General Counsel did not rebut this fact with anything more than opinion testimony and innuendo.

General Counsel and the Union also rely heavily on the testimony of Matthew Utecht. Despite his allegedly extensive observation of Mr. Wartman's involvement in the new stores, his long experience with the Union, and awareness of the importance of proving his self-serving testimony, the only extrinsic evidence he produced was a picture of Mr. Wartman operating a grill outside of Victoria's Market on one Saturday morning. Tr. 187–88; GC Ex. 4. It is unclear how one operating a grill at a grocery store for a few hours renders the lawsuit objectively baseless. Additionally, despite his alleged interest in determining Mr. Wartman's involvement in the new stores, Mr. Utecht never investigated the ownership besides visually observing

Mr. Wartman at the new stores. Tr. 211–12. He did not even take a moment each day to snap a photo of Wartman's car in the lot. Tr. 209

Utecht's recollection of events is also questionable, given that he claimed to have been at Victoria's Market for seven days a week. Tr. 190. Mr. Utecht further testified he was there at 7:30 in the morning and stayed until 6 or 7 in the evening. Tr. 206. This was directly contradicted by Richard Milbrath, a representative of the Union and a subordinate of Mr. Utecht, who testified that Mr. Utecht was only at these picket lines "a couple times a week" and, even then, was only there a "half day." Tr. 250–51. Mr. Milbrath was further sure that he would have spoken to Mr. Utecht if he had seen him on the picket line. Tr. 251. It was clear from this exchange that Mr. Utecht was willing to say anything to advance the Union's cause.

General Counsel and the Union also relied on Mr. Milbrath's testimony regarding Mr. Wartman's supposed influence over the stores. Notably, Mr. Milbrath is the same man who physically loomed stationary outside the stores, staring through a window at younger employees. Tr. 345. Though he acknowledged it was important to determine who actually owned the stores, he never engaged in discussions with management to determine the stores' true owners. Tr. 238–39. Curiously, though Mr. Milbrath took pictures of Mr. Wartman's vehicle at the store location, he never took pictures of Mr. Wartman interacting with construction crews, directing vendors or suppliers, or managing employees, despite acknowledging those observations were significant to his opinion that Mr. Wartman was truly in charge of the new stores. Tr. 257–58. He obviously never photographed Union members accosting patrons as they simply tried to buy groceries.

As will be further explained below, any factual disputes must be construed in Respondents' favor. Nonetheless, General Counsel still failed to present any credible evidence that showed Mr. Wartman's role was anything other than a landlord and unpaid independent consultant to his sons, and that Tommy was truly the person in charge. Tr. 463.

II. THE UNION CONDUCTS A COMPLETE BOYCOTT OF THE NEW STORES BASED ON ITS DISPUTE WITH FRESH SEASONS MARKETS.

As soon as Victoria's Market opened, picketers from the Union were present seven days a week. Tr. 231. Similarly, picketers from the Union were at Glen Lake's Market from the first day it opened. Tr. 233.

Incredibly, Matthew Utecht described the Union's efforts as an "informational picket." Tr. 196. When asked whether the Union was urging a boycott, he gave a non-responsive and evasive answer. Tr. 214. However, the literature and tactics used certainly extended beyond an attempt to inform the public. The Union picketers held signs urging customers to not patronize either Victoria's Market or Glen Lake's Market. Tr. 347; Resp. Ex. 52. Further, as part of their effort to shut the new stores down, members of the Union physically accosted patrons and urged them to completely boycott the new stores. Tr. 349. Mr. Utecht's adherence to the "informational picket" description of the Union's activity further discredits his testimony.

The Union members also used handbilling in conjunction with the picketing in order to disrupt business to the new stores and to encourage patrons to boycott these businesses. Resp. Exs. 53. As stated in all capital letters, emphasized with an underline and presented in a large font, these flyers clearly encouraged potential customers to not patronize either of the new stores. Resp. Exs. 53, 54.

The Union also established a website called "TomWartman.info" that encouraged "community members . . . to not shop at the 'new' store (Victoria's and Glen's [sic] Lake Market) and tell Fresh Seasons owner, Tom Wartman, that he should pay these Minnesota families what they are owed." Resp. Ex. 43.

Not only was the Union clear about its intention (a complete boycott of the new stores), the Union was also clear about *why* it was picketing the new stores—its goal was to enmesh the new stores in the Union's dispute with Fresh Seasons Markets. The handbills used at Victoria's Market specifically referenced the Union's dispute with Fresh Seasons Markets:

> PLEASE
> DO NOT PATRONIZE
> VICTORIA'S MARKET.
> TOM WARTMAN IS THE LANDLORD FOR VICTORIA'S MARKET, LLC. TOM WARTMAN ALSO OWNED FRESH SEASON MARKET LLC WHICH OWES BACK WAGES TO ITS EMPLOYEES AND OWES HUNDRED OF THOUSANDS OF DOLLARS TO THE HEALTH AND PENSION FUND FOR ITS EMPLOYEES. PLEASE DON'T PATRONIZE THIS MARKET AND TELL MR. WARTMAN TO PAY THOSE EMPLOYEES THEIR WAGES AND FRINGE BENEFITS. THANK YOU!
> UFCW LOCAL 653

Resp. Ex. 54 (emphasis in original).

In its public statements, the Union directly linked the picket lines at the new stores with the Union's belief its members were owed money by Fresh Seasons Markets. Mr. Utecht, for example, told Workday Minnesota that Mr. Wartman "should prioritize paying his former employees the money that they earned before working to benefit himself by reopening the stores." Resp. Ex. 46. Similarly, the Union, in a letter to the Glen Lake community, stated that it would end the dispute "the moment that Tom Wartman, the owner of Fresh Seasons, pays his former employees what they are owed." Resp. Ex. 49.

III. RESPONDENTS INITIATE A GOOD FAITH LAWSUIT AGAINST THE UNION REASONABLY EXPECTING SUCCESS ON THE MERITS.

A. **Respondents Conduct a Legal and Factual Inquiry to Determine There was a Basis to Bring Claims Against the Union.**

Respondents first met with legal counsel to discuss potential claims against the Union on October 23, 2015. Tr. 419. Respondents' legal counsel then conducted separate interviews with Mr. Wartman, Tommy, Will Jedlicka, and Alan Commins as part of the factual investigation into Respondents' claims. Tr. 420. Notably, Mr. Wartman was not present in any interviews that involved individuals other than himself. Tr. 420. As a result of these interviews, and review of documentary evidence and business filings, Respondents' legal counsel determined that there was sufficient legal separation between the new stores and Fresh Markets so as to justify a claim by the new stores against the Union, taking into consideration successor liability as well as the allied doctrine. Tr. 426.

As part of their factual investigation into the merit of their claims, Respondents also relied upon a section of the Board's own website, since removed by the Board, that stated:

> You may not picket to encourage a general boycott of the store. Also, you may not picket a struck product where that product accounts for all or almost all of the neutral's business, so that an appeal to the public not to buy the struck product would threaten the neutral with ruin or substantial loss.

Tr. 438, Resp. Ex. 55.

On January 25, 2016, Respondents filed a Complaint with the United States District Court, District of Minnesota, asserting a claim against the Union under Section 8 of the Act, as well as state law claims based on tortious interference and defamation (hereinafter, the "Lawsuit"). Joint Ex. M.[3] Mr. Steffenhagen, an attorney with decades of experience in employment and labor law, unequivocally testified he would not have signed the Complaint if it

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[3] This Complaint was later amended with permission from the Court and the Amended Complaint was introduced as Joint Exhibit N.

did not have an objective basis. Tr. 430. Specifically, Respondents' Section 8 claim alleges secondary picketing in violation of the Labor Management Relations Act ("LMRA"). That claim, which will be referred to below as the LMRA claim, is the focus of General Counsel and the Union's exceptions and, thus, is also the focus of this brief.

B. <u>The District Court Issues an Order Dismissing the Lawsuit Without any Finding the Lawsuit was Frivolous and Without Issuing Any Sanctions</u>.

The District Court heard the Union's Motion to Dismiss on April 8, 2016. Judge Doty declared the Lawsuit "an interesting case," a position with which the Union counsel agreed. Resp. Ex. 63 at 4–5. The Court further recognized that, according to the words of Section 8, "[p]lain reading is another person; person is a customer." Resp. Ex. 63 at 8. At the end of oral argument, the Court stated, "[T]his is an interesting case that has some features that—I'm certainly not going to issue an order off the bench here this morning." Resp. Ex. 63 at 30. If the District Court somehow believed that the Lawsuit lacked any objective basis, it made no such comment during the hearing and instead suggested the exact opposite. *See generally* Resp. Ex. 63.

The District Court issued its order on the Union's motion to dismiss on May 19, 2016. Joint Ex. O. In this order, the District Court recognized that "the general concerns addressed by § 8(b)(4) are implicated here." Joint Ex. O at 6. The Court lifted language from the Union's brief, however, to hold that "the sine qua non of a § 8(b)(4)(ii)(B) claim is conduct designed to prevent business between the primary and secondary employers." Joint Ex. O at 6. The court based this holding on the statutory language of Section 8, which contains no such restriction, and a citation to the *Local 1976, United Bhd. of Carpenters and Joiners of Am., A.F.L. v. NLRB (Sand Door)*, 357 U.S. 93 (1958), which does not construe Section 8 so narrowly. *See id.* The District

Court did not issue any *sua sponte* sanctions award in its order, or make any statement to the effect that Respondents' action was somehow frivolous or objectively baseless. *See id.*

C. Judges from the Eighth Circuit, During Oral Argument, Implicitly Acknowledge Respondents Have Valid Secondary Picketing Claims.

On March 9, 2017, the Eighth Circuit heard oral argument on Respondents' appeal in the underlying lawsuit. During oral argument, Judge Shepherd asked counsel for Appellants (Respondents in this matter) about the allegations of a family connection between Fresh Seasons Markets and the new stores. http://media-oa.ca8.uscourts.gov/OAaudio/2017/3/162786.MP3, at 11:48. After Appellants explained the familial relationship between the owners of the new stores and the owner of Fresh Seasons Markets, Judge Shepherd noted that the Union was likely trying to take advantage of this relationship. *Id.* at 12:46.

During the Union's argument, Judge Colloton explicitly asked whether the goal of the Union's activity at issue was to "get the new guys to get daddy to pay the debt . . . ***because if they were trying to influence the father, that could be sufficient, couldn't it?***" *Id.* at 18:45 (emphasis added). Counsel for the Union never answered the question and instead stated that the Complaint did not allege such a relationship, which ignored the fact that this is precisely the accusation in paragraph 20 of the Complaint and Amended Complaint:

> Local 653 has engaged in bannering, handbilling, and picketing at both Victoria's Market and Glen Lake's Market **in supposed connection with its dispute against Fresh Seasons Market and Fresh Seasons Victoria**.

Joint Exs. M and N, at ¶ 20 (emphasis added).

D. General Counsel Misstates the Procedural Posture of this Matter in a Further Attempt to Improperly Discredit Mr. Wartman.

General Counsel's misstatements of facts extend beyond the underlying dispute to the procedural posture of this matter. General Counsel states that the Union filed a lawsuit against

Mr. Wartman. GC Brief 2. General Counsel also states that the Union's lawsuit was brought to compel arbitration over Mr. Wartman. GC Brief 10. Neither statement is true. The Union filed its lawsuit against Fresh Seasons Markets only—Mr. Wartman was not a party to that matter. Joint Ex. J. General Counsel also erroneously stated that the Union filed a grievance against Mr. Wartman. GC Brief 8. Again, this statement does not comport with the facts. The Union's grievance was always with Fresh Seasons Markets, not with Mr. Wartman personally, despite the animosity that Union leadership obviously bore him. Joint Ex. J.

The statements, which are deliberate and frequent, reveal that General Counsel has taken up the Union's enmity against Mr. Wartman and has failed to distinguish the entities with which the Union had a dispute. The Union's dispute has always been with Fresh Seasons Markets, not Mr. Wartman individually, and the Union's misstatements to the contrary are precisely what underlie Mr. Wartman's defamation claims.

ARGUMENT

I. LEGAL STANDARD AND OVERVIEW.

A. Legal Standard.

Respondents incorporate the standard for a retaliatory lawsuit as stated in their brief submitted in support of their exceptions. The following salient points bear repeating, however, as they illuminate the futility of General Counsel and the Union's arguments:

- All factual disputes must be construed in favor of Respondents and, if there is a key factual dispute, the lawsuit cannot be retaliatory. *Bill Johnson's Rests. v. NLRB*, 461 U.S. 731, 745 (1983); *Ray Angelini*, 351 NLRB 206, 208 (2007).

- The success of a lawsuit is immaterial as to whether it is objectively baseless, and a lawsuit is not retaliatory just because it was dismissed, even if a court issues sanction. *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 521-22, 526 (2002).

- A lawsuit is not retaliatory merely because it "entails some tacking into the wind of adverse precedent." *Children's Hosp. Med. Ctr. of N. Cal.*, 351 N.L.R.B. 569, 571 (2007). *See also BE&K Constr. Co.*, 536 at 532 (even unsuccessful lawsuits may not be objectively baseless since "[t]hey also promote the evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around").

- The right to seek redress of grievances in Court is "one of "the most precious of the liberties safeguarded by the Bill of Rights, . . . implied by the very idea of a government, republican in form." *Id.* at 524-25.

Given these established principles, General Counsel and the Union simply cannot establish that Respondents' LMRA claim is objectively baseless when Respondents can rely on federal case law and Board decisions that directly support their argument. Any criticism of those cases is irrelevant in this context, where Respondents need only show that there was some basis for the lawsuit. General Counsel and the Union also cling to factual arguments that are unavailing when factual disputes must be resolved in Respondents' favor. At base, the charges brought in this matter are an attempt to stifle Respondents' First Amendment right to seek redress in the courts and, for reasons further explained *infra*, the Board should not "usurp the traditional fact-finding function of the . . . jury or judge." *Bill Johnson's,* 461 U.S. at 745.

B. Overview.

The ALJ correctly determined that Respondents' LMRA claim had a legitimate basis. General Counsel and the Union obviously disagree and, though their approach somewhat differs, their arguments can be grouped under two general categories: 1) the LMRA claim was objectively baseless because the *sine qua non* of a secondary picketing claim is the disruption of business between the primary and secondary employers; 2) the new stores were allied with Fresh Seasons Markets. Both of these arguments fail given the standard of law that applies in this matter, as well as in the context of the relevant case law and board decisions. Respondents shall thus demonstrate:

- Established precedent holds that secondary picketing occurs when a union disrupts business between the secondary, neutral employer and some third parties, ***including customers***, in an attempt to involve the secondary employer in the union's dispute with another. As Respondents showed at the hearing, this is precisely what the Union did.

- The allied doctrine is fundamentally ill-suited to any argument that a lawsuit is objectively baseless since the doctrine is fact-intensive and malleable. General Counsel and the Union's efforts to find supporting cases are thwarted by the lack of on-point decisions and, moreover, the legal standard required the ALJ to construe all factual disputes in Respondents' favor.

- Most of General Counsel's exceptions are addressed as part of the above arguments and General Counsel's disputes with the ALJ's factual findings are irrelevant in this context.

For these reasons, and based on the arguments presented below, Respondents respectfully request that the Board affirm the ALJ's findings as it relates to the Respondents' LMRA claim and allow the Lawsuit to proceed.

II. FEDERAL CASE LAW AND BOARD DECISIONS SHOW THE UNION VIOLATED THE LMRA WHEN IT ENMESHED THE NEW STORES IN THE UNION'S DISPUTE WITH FRESH SEASONS MARKETS.

A. The Plain Language of Section 8 Supports Respondents' Claim.

The relevant statutory language supports Respondents' claim based on secondary picketing in violation of Section 8 of the Act:

> It shall be an unfair labor practice for a labor organization or its agents . . . (4) . . . (ii) to threaten, coerce, or restrain any person . . . where . . . an object thereof is . . . (B) forcing or requiring ***any person*** . . . to cease doing business with ***any other person***.

29 U.S.C. § 158(b)(4)(ii)(B) (emphasis added). In direct contrast to the Act's plain language, the Union asks the Board to interpret language that states "forcing or requiring ***any person*** . . . to cease doing business with ***any other person***," 29 U.S.C. § 158(b)(4)(ii)(B) (emphasis added), in a way that means the first "any person" ***must*** be the secondary employer and that the second

"any other person" ***must*** be the primary employer. This interpretation lies in direct odds with the expansive language of the Act.

The Act has since been interpreted to establish two prongs for a secondary picketing claim. First, the union's action must be in furtherance of an unlawful objective. *NLRB v. Denver Bldg. & ConsTr. Trades Council*, 341 U.S. 675, 687, 71 S. Ct. 943, 951 (1951) (holding the union attempts an unlawful objective when it forces "an employer **or other person** to boycott someone else" other than the primary employer) (emphasis added). Second, the Union's activity must be sufficiently coercive. *NLRB v. Fruit & Vegetable Packers & Warehousemen* (*Tree Fruits*), 377 U.S. 58, 72 (1964). *See also Hershey Chocolate*, 153 NLRB 1051, 1058 (1965) ("This section proscribes, as did the corresponding provisions of the 1947 Act, the implication of neutral employers in labor disputes not their own where an object is to force the cessation of business relations between the neutral employer **and any other person**.") (emphasis added). These two prongs, and the supporting facts, will be dealt with, in turn.

B. The Union Attempted an Unlawful Objective When It Involved the New Stores in the Union's Dispute with Fresh Seasons Markets, Something the Union Made Explicitly Clear Through its Public Messaging and Stated Goals.

The Union has tirelessly argued that the *"sine qua non"* of a secondary picketing claim is the disruption of business between the primary and secondary employers and it repeats those arguments here. As the United States Supreme Court explained in the *Tree Fruits* case, however, a union is forbidden from attempting to "persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, ***or to put pressure upon***, the primary employer." *NLRB v. Fruit & Vegetable Packers & Warehousemen* (*Tree Fruits*), 377 U.S. 58, 63 (1964) (emphasis added). Similarly, in *NLRB v. International Union of Operating Engineers (Operating Eng'rs)*, the Supreme Court found that the union had engaged in unlawful activity targeted at a secondary employer where the union specifically targeted the secondary employer in order to force it to weigh in on the dispute with the primary employer—once again, the precise scenario presented in Respondents' LMRA claim. 400 U.S. 297, 303 (1971).

In *International Longshoremen's Association v. Allied International* (*Allied International*), the union urged picketing of the goods from, or destined to, the Soviet Union based on the latter's invasion of Afghanistan. 456 U.S. 212, 214 (1982). In other words, the union's dispute was with a foreign sovereign state more than 4,500 miles away. *See id.* Nonetheless, the U.S. Supreme Court recognized that the pressure placed on the secondary employers can give rise to a Section 8 claim, especially "when a purely secondary boycott reasonably can be expected to threaten neutral parties with ruin or substantial loss." *Id.* at 224. Yet again, that is what Respondents allege in the Lawsuit.

Case law in the Eighth Circuit is similarly supportive of Respondents' position. The Eighth Circuit has explained that the Act was amended to forbid secondary picketing "with the objective of forcing the third party to bring pressure on the employer to agree to the union's demands." *Ruzicka Elec. & Sons, Inc. v. IBEW, Local 1*, 427 F.3d 511, 519 (8th Cir. 2005) (quoting *Operating Eng'rs*, 400 U.S. at 302-03). The *Ruzicka* Court, citing an earlier Eighth Circuit case, further explained that unlawful secondary picketing occurs "[o]nly when a labor organization intends to enmesh neutral secondary employers in primary labor disputes between the union and another employer." *Id.* 519 (internal quotation marks omitted) (quoting *NLRB v. ConsTr. & Gen. Laborers' Union Local 1140*, 577 F.2d 16, 18 (8th Cir. 1978)). In other words, established Eighth Circuit precedent unambiguously holds that a union violates Section 8 if it conducts coercive picketing with the intended objective of enmeshing a secondary employer in a labor union's dispute with the primary employer.[4]

Board decisions similarly support Respondents' LMRA claim. In *Knight Newspaper, Inc.*, the Board found the union committed secondary picketing based on the disruption of business between the neutral and its customers and suppliers. 138 N.L.R.B. 1346, 1962 NLRB LEXIS 278, at *4 (1962). There, the Trial Examiner held "[i]t does not appear necessary" to consider the business relationship between primary and secondary employers and that it was sufficient the "**object**" was to cause the neutral "to cease doing business with other persons engaged in commerce" with the intent of forcing the neutral into the primary dispute. *Id.* at *24 (emphasis added). The Trial Examiner in *New York Shipping Association* came to the same conclusion when faced with picketing that did not disrupt business between primary and secondary employers, in a finding adopted by the Board:

> Are such objectives proscribed by Section 8 (b) (4) (A) though it does not appear that the picketing was aimed at forcing a refusal to use a product or service of, or to bring about a cessation of business dealings with the particular employers involved in the primary dispute? **I am satisfied they are.**

107 NLRB 686, 710 (1954) (emphasis added).

Further support for Respondents' position can be found in *Teamsters Local 732 (Servair Maintenance)*, 229 NLRB 392 (1977). In that case, the Board determined that disruption of

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[4] This result is consonant with decisions from other circuits. *E.g. Kroger Co. v. NLRB*, 647 F.2d 634, 637 (6th Cir. 1980) ("Congress passed § 8(b)(4)(ii)(B) to prevent a union involved in a dispute with a primary employer from forcing a neutral secondary employer to enter the fray on the union's side to preserve its own business."); *Limbach Co. v. Sheet Metal Workers Int'l Ass'n*, 949 F.2d 1241, 1253 (3d Cir. 1991) (explaining union activities have an unlawful objective if they are designed to enmesh a secondary neutral in the union's dispute with the primary employer); *Local Union No. 25, A/W Int'l Bhd. of Teamsters, etc. v. NLRB*, 831 F.2d 1149, 1153 (1st Cir. 1987) (holding that the defendant-union's objective of forcing the cooperation of the secondary employer was unlawful under the LMRA).

business between the primary employers and third parties was sufficient to violate the Act. *Id.* at 392. Specifically, the Board agreed that this conduct was enough to meet the "cease doing business" prong of an LMRA claim. *Id.* Further, the Board found this prong was met when the union dissuaded customers from doing business with the charging party. *Id.* ***This is exactly what Respondents allege in the Lawsuit.***

It is clear the Union engaged in its efforts in order to force the new stores to put pressure on Fresh Seasons Markets. The Union's handbills plainly referenced this dispute. Resp. Exs. 53 and 54. The Union made statements to the media during the picket attacking Fresh Seasons Markets. Resp. Ex. 46. In a letter to the public, the Union even stated it would end the picketing "[t]he moment that Tom Wartman, as owner of Fresh Seasons, pays his former employees what they are owed." Resp. Ex. 49. The Union strongly emphasized the connection between its picketing efforts and its dispute with Fresh Seasons Markets and, in doing so, enmeshed the new stores in the Union's dispute with the primary employer. *See, e.g.*, *Ruzicka Elec.*, 427 F.3d at 519.

The Union disagrees with many of the cases relied upon by the arbitrator and attempts to distinguish them as involving construction disputes with a common situs. Union Brief 15–17. Of course, the Union's contentions over what it thinks is controlling law is not the standard in this matter. Indeed, the Union fails to identify any limiting language in these decisions that would objectively preclude their application to this fact scenario and the Union's disagreement with those holdings is meaningless in this context. The Union can certainly make those arguments in the underlying Lawsuit, as it attempts to add further gloss to the decades of case law interpreting the LMRA. The Union may even be successful in adding strictures to unlawful picketing claims that were not present before, but that is entirely besides the point here, where

Respondents need only show they had a reasonable basis to bring their Lawsuit at the time they filed the Complaint. *See BE&K Constr. Co.*, 536 U.S. at 526.

As shown *supra*, precedent from the United States Supreme Court, multiple federal circuit courts, and even Board decisions directly refute the *sine qua non* argument that the Union advanced in the district court and before the ALJ, and which it now advances before the Board. Regardless of the outcome of the appeal in the Lawsuit, it is impossible to say that Respondents did not have an objective basis to bring a claim based on the Union's conduct. *See id.* at 532 (holding that "even unsuccessful but reasonably based suits advance some First Amendment interests" and finding a lawsuit was objectively based even though it was dismissed at the pleadings stage).

C. The Union's Conduct was Sufficiently Coercive to Support a Claim of Secondary Picketing.

As stated by the U.S. Supreme Court in *Tree Fruits*, "when consumer picketing is employed to persuade customers not to trade at all with the secondary employer . . . the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer." *Tree Fruits*, 377 U.S. at 72. This holding was bolstered in the *Safeco* case where the US. Supreme Court explained that unlawful picketing occurs when a union takes actions that are "reasonably calculated to induce customers not to patronize the neutral parties at all." *NLRB v. Retail Store Emps. Union (Safeco)*, 447 U.S. 607, 614 (1980). This point of law is not lost on the Board, which once stated on its website in reference to secondary pickets, "[y]ou may not picket to encourage a general boycott of the store." Tr. 438, Resp. Ex. 55.

During the briefing before the Eighth Circuit, the Union conceded that its conduct was sufficiently coercive so as to satisfy that aspect of a secondary picketing claim. Resp. Ex. 65 at 33. Nonetheless, Mr. Utecht made the absurd and contradictory claim during the hearing that the

Union was only conducting an "informational picket." Tr. 196. Of course, the Union's signs clearly informed customers not to patronize the markets. Resp. Ex. 52. The Union also urged people not to patronize the store in its "letter to the public." Resp. Ex. 50. As a result, customers stopped shopping at the new stores. Tr. 349. The Union's efforts were obviously "calculated to induce customers not to patronize the neutral parties at all." *Safeco*, 447 U.S. at 614. Further this is exactly the type of conduct that has been found sufficiently coercive in countless federal cases and Board decisions. *E.g. Id.*; *Tree Fruits*, 377 U.S. at 72; *Ruzicka*, 427 F.3d at 519; *Servair Maintenance*, 229 NLRB at 392.

Simply put, there is no good faith argument that the Union engaged in an "informational picket" as opposed to coercive conduct sufficient to support Respondents' secondary picketing claim. At most, the Union cites what it believes are countervailing facts, rather than focus upon whether the LMRA claim was objectively baseless.

II. THE ALLIED DOCTRINE IS ENTIRELY INAPPROPRIATE IN THIS CONTEXT GIVEN ITS UNCERTAIN DEFINITION AND FACT-INTENSIVE NATURE.

A. The Allied Doctrine is Fundamentally Incompatible with Any Argument that Respondents' LMRA claim is Objectively Baseless.

The entirety of General Counsel's brief focuses on the allied doctrine, perhaps recognizing the futility of adopting the Union's *sine qua non* argument. The Union also argues the allied doctrine. In so doing, both General Counsel and the Union ignore a fundamental challenge to the application of the allied doctrine in this context. As General Counsel and the Union admit, the allied doctrine eludes strict definitions and is subject to a case-by-case analysis. GC Brief 14–15. *See also Teamsters Local 560 (Curtin Matheson Scientific)*, 248 NLRB 1212, 1214 (1980). How could Respondents possibly know that a claim would be precluded by the allied doctrine when it's not even clear how the allied doctrine is defined? Simply put, they could not.

Moreover, questions involving the allied doctrine "can be resolved only by considering on a case-by-case basis the factual relationship which the secondary employer bears to the primary employer." *Curtin Matheson*, 248 NLRB at 1214 (quoting *Vulcan Materials Co. v. United Steelworkers of Am.*, 430 F.2d 446, 451 (5th Cir. 1970)). This factual analysis is directly contrary to the axiom – applicable in this matter – that all factual disputes must be resolved in favor of Respondents. *See Bill Johnson's*, 461 U.S. at 745; *Ray Angelini*, 351 NLRB at 208. Put differently, it is not possible that the Lawsuit could be objectively baseless if this determination requires a determination of disputed facts.

Perhaps for this reason, General Counsel and the Union have failed to cite ***a single case*** where the Board found that an LMRA claim was objectively baseless based on the allied doctrine. Instead, as further explained below, General Counsel relies on cases where the Board may have rejected a secondary picketing claim because of the allied doctrine. **That is not the correct standard**. Respondents did not bear the burden at the hearing to prove their secondary picketing claims. *See Milum Textile Servs. Co.*, 357 N.L.R.B. 2047, 2053 (2011). Rather, it was the General Counsel's burden "to prove that the Respondent[s], when [they] filed [their] complaint . . . did not have and could not reasonably have believed [they] could acquire through discovery or other means evidence needed to prove essential elements of its causes of action." *See id.* General Counsel and the Union failed to meet this burden.

B. The Traditional Definitions of the Allied Doctrine do not Apply in this Case.

The allied doctrine is customarily split into two tests—the struck work test and the straight operation test. *Hershey Chocolate Corp.*, 153 NLRB 1051, 1060 (1965). Under either test, General Counsel and the Union failed to show that the new stores were allies with Fresh Seasons Markets.

The "struck work" test for the ally doctrine is implied when the ally is doing the work of the struck employer. *Id.* This in turn requires some degree of cooperation between the primary employer and ally. *Id.* In fact, in all cases involving the "struck work" test of the ally doctrine, the primary employer was still in business. *E.g. NLRB v. Bus. Mach. & Office Appliance Mechs. Conference Bd.*, 228 F.2d 553, 559 (2d Cir. 1955) (primary employer and ally in business at same time); *Curtin Matheson*, 248 NLRB at 1215 (same); *Douds v. Metro. Fed'n of Architects, etc.*, 75 F. Supp. 672, 677 (S.D.N.Y. 1948) (holding the union employer's employees were available to do the work done by the non-union employer). The reason for this is simple—it is impossible that a primary employer could do the work of another if a primary employer is no longer in business. Here, Fresh Seasons Markets could not have done the work of Glen Lake's Market or Victoria's Market, because Fresh Seasons Markets had ceased operations a full year before the new stores opened. Thus, it is impossible to find that Respondents were allies of Fresh Seasons Markets under the "struck work" test of the ally doctrine. *See Hershey*, 153 NLRB at 1060.

The straight-line test leads to similar results. "[A] straight-line operation . . . is one in which the activities of two companies are so integrated and interdependent that they must be regarded as a single operation for the purpose of applying the ally concept." *Hershey*, 153 NLRB at 1061 (internal quotation marks omitted). As a threshold requirement for establishing a "straight-line operation," it is first necessary to show "common ownership and control of the primary employer and secondary employer." *Id.* (*citing J. G. Roy & Sons Co. v. NLRB*, 251 F.2d 771, 773-74 (1st Cir. 1958)). Common control cannot be presumed through common ownership, however, but requires substantial evidence of *actual* common control *J. G. Roy*, 251 F.2d at 773-74. Here, Respondents proffered significant evidence that there was no common control and the ALJ was required to resolve such disputes in favor of Respondents. *See Bill Johnson's*, 461 U.S. at 745; *Ray Angelini*, 351 NLRB at 208.

Of course, General Counsel and the Union essentially abandon these traditional tests, recognizing that neither would come close to foreclosing Respondents' lawsuit, and instead strike out in search of some other definition that may actually apply in this situation.

C. General Counsel and the Union Fail to Identify Any Other Allied Doctrine Test that Would Render Respondents' Lawsuit Objectively Baseless.

Acknowledging that the traditional tests under the allied doctrine are inapplicable, the General Counsel and Union assert that the allied doctrine is malleable and that it precludes Respondents' LMRA because, from their perspective, it certainly *feels* like the new stores were allied with businesses that were shuttered a year earlier. Perhaps General Counsel and the Union are advocating for an "I know it when I see it" definition of the allied doctrine. *See Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S. Ct. 1676, 1683 (1964) (J. Stewart concurring). Whatever benefit that approach may have to the Union in the underlying lawsuit, it is wholly inapplicable here, where General Counsel must, instead, prove that Respondents' LMRA claim was, objectively, entirely foreclosed by precedent. This was a herculean task given the high standard that governs this matter. Despite admirable efforts, General Counsel and the Union failed to make this showing and the cases upon which they rely do nothing to change this ineluctable outcome.

General Counsel and the Union cite to *Teamsters Local 282 (Acme Concrete)*, 137 NLRB 1321 (1962), to support their argument that close family ties between Fresh Seasons Markets and the new stores were enough to demonstrate the new stores were allies. This case is clearly inapposite because it involves a charge of secondary picketing brought by the employer, not a claim for retaliation brought by the Board. *Id.* at 1322. Moreover, Board Member Rodgers penned a dissent in *Acme Concrete*, stating the secondary employer had valid claims against the union despite the close family ties with the primary employer. *Id.* at 1324. As Member Rodgers noted, close family "meets no accepted definition of 'ally' or 'single employer.'" *Id.* at 1325. Further, according to Member Rodgers, the Board had failed to show "common ownership, common management, common control of labor relations, integration of operations, and complete dependence of one company on the other." *Id.* at 1325-26. Because those essential elements were missing, Member Rodgers opined that the secondary employer was a neutral and had valid Section 8 claims against the union. *Id.* at 1326.

That is exactly the case here. As stated *supra*, there was no common ownership, common management, or common control between Fresh Seasons Markets and the new stores. Certainly, there could be no integration or dependence since Fresh Seasons Markets had ceased operation one full year before the new stores opened. General Counsel and the Union cannot show Respondents' lawsuit was objectively baseless when one of the Board's previous Members would have rejected the same argument General Counsel and the Union make here. A lawsuit is not retaliatory merely because it "entails some tacking into the wind of adverse precedent." *See Children's Hosp.*, 351 N.L.R.B. at 571. For this reason, the ALJ properly rejected General Counsel and the Union's reliance on this case. ALJD 20:45–21:8.

General Counsel also relies upon *Cofab Inc.*, 322 NLRB 162 (1996). As an initial matter, this case is inapplicable for the same reason that **all** of the cases cited by General Counsel and the Union are inapplicable—it does not involve a determination as to whether a secondary picketing claim is objectively baseless. *See id.* Moreover, it is instantly distinguishable on the facts. In that case, the employees as well as "the supervisors and management officials of [the secondary employer] were substantially identical to those at [the primary employer]." *Id.* Here, the new stores had an entirely new workforce and did not share any management personnel that were at Fresh Seasons Markets when those stores closed. Tr. 202, 476–77.

In addition to failing to address the question at hand—whether Respondents' lawsuit is objectively baseless—the other cases cited by General Counsel are distinguishable for similar reasons. *Mastronardi Mason Materials* involved actual shared ownership between primary and secondary employers, 336 N.L.R.B. 1296, 1298-1300 (2001), whereas there is no shared ownership here. Tr. 134–35, 138, 140, 290, 301, 307; Resp. Exs. 2, 11–13, 25–27. In *Fallon-Williams*, the parties stipulated, *inter alia*, that the two entities have substantially identical management, operations, and supervisors, 336 N.L.R.B. 602, 602 (2001), but here Respondents vigorously disputed any such assertion and showed definitively that the new stores had entirely new management, operations, and supervisors. Tr. 279, 285–86, 329–31, 476–77. In *Kenmore Contracting*, the owners were solely part of the same family, 336 N.L.R.B. 602, 602 (2001), whereas, here, Mark Ploen, a non-family member, had an undisputed 50% interest in the new stores. Tr. 138, 140, 307; Resp. Exs. 11–13, 25–27. *Midwest Precision* is distinguishable because that case involved shared ownership only within the family and because those operations had "substantially identical management and supervision." 341 N.L.R.B. 435, 435 (2004). Again, the ownership interests of the new stores were not confined to the Wartman family and the operations between Fresh Seasons Markets and the new stores involved new management and new supervision.

General Counsel and the Union cherry-pick facts from their cases to support an argument that the new stores were allies with Fresh Seasons Markets, but that approach is a wholly misguided effort here. General Counsel and the Union must do more than make an argument by balancing various factors. Instead, General Counsel and the Union had to show that the Lawsuit was "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *BE&K Constr. Co.*, 536 U.S. at 526. The distinctions cited above are enough to justify Respondents' reasonable belief that there was merit to the Lawsuit. *See id.* at 532 (holding that litigants should be given latitude to test new legal theories). Further any factual disputes are to be construed in Respondents' favor. *See Bill Johnson's*, 461 U.S. at 745; *Ray Angelini*, 351 NLRB at 208. These two principles effectively preclude General Counsel and the Union from finding an analogue in the Board's decisions regarding the allied doctrine.

Finally, General Counsel claims that Respondents failed to cite legal authority to support their position. GC Brief 23–24. This argument highlights General Counsel's fundamental misunderstanding about whose burden it was to prove their case at the hearing. Respondents did not need to prove anything at the hearing. *See Milum Textile Servs. Co.*, 357 N.L.R.B. 2047, 2053 (2011). Rather, General Counsel and the Union had to prove that Respondents could not have objectively expected success in the Lawsuit. *See id.* This is a drastically different burden and, in this situation, that difference is dispositive in Respondents' favor.

D. Respondents have Never Attempted to Argue that Thomas B. Wartman has a Valid LMRA Claim.

General Counsel erects a straw-man argument by suggesting that Respondents had no legal basis to suggest that Thomas B. Wartman was neutral vis-à-vis the Union. In doing so, General Counsel ignores hundreds of pages of briefing up to this point where Respondents have repeatedly argued for the LMRA claims *brought on behalf of the new stores*. Respondents have never argued that Mr. Wartman could bring a claim for secondary picketing, nor could they since Mr. Wartman is not an employer as understood by the Act. *See* 29 U.S.C. § 152(2); ALJD 28:n.48. The Board should disregard this argument, which is an obvious attempt to misstate

Respondents' position.

III. GENERAL COUNSEL'S MULTIPLE EXCEPTIONS ARE IRRELEVANT TO THE BOARD'S FINAL DETERMINATION.

Eschewing the adage that less is more, General Counsel has asserted twenty-three exceptions to the ALJ's decision. General Counsel submitted no argument in support of specific exceptions, however, perhaps recognizing the irrelevant nature of many of these exceptions. A brief review of some of these exceptions demonstrates why it was futile to argue these points in significant detail.

The first set of exceptions are variations on General Counsel's dispute over the ALJ's central finding that Respondents' LMRA claim had an objective basis, which is addressed *supra* in detail. Some of these exceptions criticize the ALJ's reliance on certain case law and the ALJ's decision to discount other decisions. This is irrelevant, since Respondents only needed to show a good faith basis for bringing the claim, even if it entailed arguments that contradicted established authority. *See BE&K Constr. Co.*, 536 at 532; *Children's Hosp. Med. Ctr. of N. Cal.*, 351 N.L.R.B. at 571.

Many of these exceptions relate to the ALJ's findings of fact in this matter. For example, General Counsel excepts the ALJ's finding that Mr. Wartman had only signed checks for a limited time and only for remodeling work and petty cash. General Counsel even provides a header stating "Undisputed Record Facts Omitted from the Administrative Law Judge's Decision." This begs an inevitable question: so what? General Counsel appears to forget that all factual inferences are to be construed in Respondents' favor. *Bill Johnson's*, 461 U.S. at 745; *Ray Angelini*, 351 NLRB at 208. In regards to the objective basis of the underlying lawsuit, the ALJ could **only** err if he had construed a fact **against** Respondents, errors that are detailed in Respondents' brief in support of their exceptions. Thus, General Counsel's exceptions are meritless to the extent they challenge factual determinations.

These exceptions, and the exceptions raised by the Union, illuminate the overzealous nature demonstrated by the Union and General Counsel in pursuing this case. Instead of allowing the process to work out in the courts, a process which includes an appeal before the Eighth Circuit that is now awaiting an imminent decision, the Union has sought to hedge its bets by bringing a charge that it hoped would stop Respondents' LMRA claim in its track. General Counsel has unfortunately taken the Union's indefensible side in this dispute. The ALJ understood the standards that applied to the charge, however, and correctly ruled that Respondents' LMRA claim had an objective basis. It is now time for the Board "stay its hand" and allow this process to work out in the courts, as required by the First Amendment. *See Bill Johnson's*, 461 U.S. at 747.

CONCLUSION

For the above reasons, Respondents respectfully request that the Board affirm the ALJ's decision as it relates to Respondents' LMRA claim.

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Dated: August 28, 2017

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